No. 80-429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COUNTY OF WASHINGTON, *et al.*,
Petitioners,

v.

ALBERTA GUNTHER, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE COALITION OF LABOR UNION WOMEN, THE WOMEN'S EQUITY ACTION LEAGUE, THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA and NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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January 28, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in

the national effort to assure civil rights to all Americans. The Committee has over the past eighteen years enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office and its nine local offices throughout the country, the Lawyers' Committee has been actively involved in the enforcement and interpretation of the Civil Rights Act of 1964. To secure the rights of minorities and of women, it has litigated well over a hundred cases under Title VII of that Act.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of labor unions. CLUW has thirty active chapters throughout the United States with members from more than 65 International Unions. CLUW is dedicated to the participation of women within their unions and to removing all forms of discrimination in the workplace.

The Women's Equity Action League is a national membership organization created to promote educational, legal and economic equality for women. It has a particular interest in this case because of its commitment to the principle of fairly compensating work done by women on the same basis as work done by men.

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is a non-profit corporation established under the laws of the State of New York to assist minorities to secure their constitutional and statutory rights through the prosecution of lawsuits. Since the effective date of Title VII, the Fund has prosecuted hundreds of cases under that statute, challenging employment discrimination based on race or sex. Because many low-paid jobs for women are disproportionately held by blacks, the in-

terpretation of Title VII's ban on sex discrimination will have a strong impact on black women.

The Women's Bar Association of the District of Columbia is a voluntary, non-profit organization of attorneys with over 1000 members. The Women's Bar Association is concerned with local and national issues which particularly affect women and the law, and is dedicated to the advancement and protection of the interests of women.

The National Education Association is the nation's oldest and largest organization of educators, with a current membership of more than 1,700,000 persons. NEA believes that reversal of the lower court's ruling in this case would substantially restrict Title VII protection for public school teachers employed in positions such as coaching, where women may be performing work that is similar to work performed by males, but which a court may not find to be "substantially equal."

The participation of *amici* in this case reflects their belief that women continue to encounter pervasive discrimination in the workplace, including discrimination in rates of compensation. The purpose of Title VII of the 1964 Civil Rights Act was to afford a federal remedy against such discrimination, to women as well as to members of racial and national origin minority groups. This purpose can be realized only by giving the Act a reading consistent with its remedial goals. *Amici* believe that the Ninth Circuit's construction of the Act in this case is consistent with both the statutory language and the legislative purpose and should be affirmed; and that a contrary interpretation could sharply limit progress toward the elimination of sex-based differentials in compensation and terms and conditions of employment.[1]

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[1] The parties' written consents to the filing of this brief are being filed with the Clerk pursuant to Rule 36.2 of the Supreme Court.

STATEMENT

Respondents, matrons employed by the petitioner County to guard female inmates of the county jail, brought suit under Title VII of the 1964 Civil Rights Act in the United States District Court for the District of Oregon, alleging that they had been discriminated against with respect to compensation because of their sex in that they were not paid the same salary as men who performed the equivalent task of guarding male inmates. The district court found that, although the matrons' jobs may have required as much skill as those of the male guards, the matrons' jobs did not require equal effort or responsibility, since men and women had substantially different workloads. It also held that, if plaintiffs could not establish equality of work under the standards of the Equal Pay Act, they could not prove discrimination under Title VII. (Pet. App. 68-70.)

The court of appeals upheld, as not clearly erroneous, the findings of the district court that the jobs of female matrons and male guards were not equal under the standards of the Equal Pay Act. It held, however, that Title VII was of broader scope than the Equal Pay Act, and that plaintiffs were entitled to prove, if they could, that a portion of the discrepancy between their salaries and that of the male guards could be ascribed only to sex discrimination. *Gunther* v. *County of Washington*, 623 F.2d 1303, 1314 (9th Cir. 1979). On rehearing, in answer to the contention that its decision would reinstate a standard of "comparable worth" which Congress, in adopting the Equal Pay Act, had rejected, the court below specifically noted that the effect of its decision would not be to substitute a "comparable worth" standard for an "equal worth" standard. It said (623 F.2d at 1321):

> Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case

based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases, an equal work theory will provide the most practical method of establishing a prima facie case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII.

SUMMARY OF ARGUMENT

The basic question in this case is whether allegations of discrimination against women in compensation because of their sex state a claim under Title VII in the absence of an allegation that men and women occupy similar jobs. Petitioner's position that the Bennett Amendment incorporates into the definition of discrimination the limitations of the Equal Pay Act would mean that, no matter how intentional the lowering of the salary for a job because it was to be occupied by a woman; no matter how deliberate the practice of using different systems for fixing the wages of men's and women's jobs, there can be no remedy for such disparate treatment unless the women involved can demonstrate that equal jobs are filled by men. The court below, like the Third Circuit in *IUE* v. *Westinghouse Elec. Corp.*, 631 F.2d 1094 (3d Cir. 1980), *petitions for cert. filed*, 49 U.S.L.W. 3410 (Nov. 14, 1980), 3456 (Dec. 11, 1980), properly rejected that position.

A. There can be a showing of discrimination in compensation on the basis of sex without a showing of comparable worth of dissimilar jobs under a system of industrial job evaluation. Discrimination would occur if an employer deliberately lowered the salary of a particular job because it was to be filled by a woman, even

if no man occupied a similar position. *See Roesel* v. *Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979).

The use of a system for fixing the compensation of women different from the system used for compensating men, with the inevitable lowering of women's salaries as a result, is discriminatory whether or not men and women occupy equivalent jobs. This Court so recognized in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978) when it held that it was a violation of Title VII to lower the compensation of women by requiring them to pay more into a pension fund than was required of men. Nowhere in its opinion did the Court find it necessary to discuss whether all jobs were occupied by both men and women; the significant fact was that women as a class were treated differently from men as a class.

While there can be instances of discrimination against individual women in compensation with respect to dissimilar jobs, by and large, where the jobs are not equal, the discrimination is likely to be systemic; *i.e.*, to result from differences in the scale or method by which salaries are fixed for men and for women. There is no reason to attribute to Congress an intention to permit such systemic discrimination against women when it clearly forbade such discrimination against other minorities.

The Equal Pay Act, at the time it was passed, was recognized as being an act of limited scope. Title VII, on the other hand, was a broad statute aimed at eradicating discrimination in employment as a factor in American life. When Congress, which had originally focused on discrimination against blacks and minorities, added sex as a prohibited basis for discrimination, it knew that it was prohibiting all forms of discrimination except for defined exceptions.

B. Section 703(a) makes unlawful "all practices in whatever form which create inequality in employment

due to discrimination on the basis of race, religion, sex or national origin." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). The Bennett Amendment, which appears in Section 703(h) (relating to defenses), cannot reasonably be read as curtailing the broad definition of unlawful acts in Section 703(a). It permits defenses "authorized" under the Equal Pay Act. The fact that the Equal Pay Act forbids pay differentials only for equal work, with certain exceptions, does not mean that it authorizes discrimination for unequal work. "Authorize" means to establish or approve by authority. The acts authorized by the Equal Pay Act are the exceptions which permit unequal pay for equal work.

The legislative history of the Bennett Amendment does not support the view that the Amendment was intended to limit the definition of discrimination in Section 703 (a). The remarks on which petitioner relies are so equivocal that they do not serve to overcome the normal reading of Section 703(h) as relating to defenses rather than as qualifying the definition of discrimination in Section 703(a).

The early EEOC guidelines on sex discrimination and the opinions of its general counsel, on which petitioner relies, state no more than that the standards for determining what constitutes equal work for the purposes of the Equal Pay Act would be used in determining whether discrimination under Title VII exists where men and women perform "equal work." This does not exclude recognition of discrimination in compensation other than unequal pay for equal work. Nothing in the guidelines or the opinions represents a determination that a system of disparate treatment in fixing the salaries of men and women would not constitute a violation of Title VII. To the contrary, when presented with such a claim, the Commission, under the early guidelines, held that the allegations stated a claim under Title VII.

The only two judicial decisions which have considered the question of the Bennett Amendment in depth are the

decision below and the decision of the Third Circuit in the *IUE* case, *supra*, which is in accord. The opinions on which petitioner relies relate to the sufficiency of proof in the particular case, rather than to the general question of whether there can be proof of discrimination in compensation with respect to different jobs. In many of the cases, the claims were that women were paid less money for doing jobs similar to those filled by men. There was in those cases no proof of intentional sex discrimination because the jobs were filled by women, or that different methods were used to fix the salaries of men and women, or even that gross dissimilarity in pay with respect to similar, even though different, jobs was at least in part attributable to the fact that the jobs were filled by women. The Tenth Circuit, in *Lemons* v. *City of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3250 (Oct. 6, 1980), rejects, as proof of discrimination, a showing of comparable worth of totally dissimilar jobs for which compensation had been fixed by a method which the district court found to be the same for men and women. That decision in no way conflicts with the position of the court below. What is involved here is an allegation of deliberate discrimination against women because of their sex. That states a cause of action under Title VII, even if men and women do not occupy the same or equal positions.

ARGUMENT

THERE CAN BE DISCRIMINATION IN COMPENSATION BASED ON SEX UNDER TITLE VII EVEN IF MEN AND WOMEN DO NOT WORK AT EQUAL JOBS

The basic question in this case is whether allegations of discrimination against women in compensation because of their sex, like allegations of discrimination based on national origin or race, state a cause of action under Title VII without the necessity of alleging (and proving) that the women who claim to have been discriminated against

occupied positions equal to those occupied by men. Petitioner's position—that Section 703(h) of Title VII, known as the Bennett Amendment (set out *infra* at 15-16), incorporates the limitations of the Equal Pay Act into the definition of discrimination, rather than setting forth possible defenses to a *prima facie* case—would mean that, no matter how intentional the lowering of wages for particular jobs because they were filled with women; no matter how widespread the practice of using different systems for determining the wages of men's and women's jobs, there can be no remedy for such disparate treatment unless the women involved can demonstrate that substantially equal jobs are filled by men. The court below, like the Third Circuit in *IUE* v. *Westinghouse Elec. Corp.*, 631 F.2d 1094 (3d Cir. 1980), *petitions for cert. filed*, 49 U.S.L.W. 3410 (Nov. 14, 1980), 3456 (Dec. 11, 1980), properly rejected that position. The Bennett Amendment does not define discrimination. Discrimination is broadly defined in Section 703(a). The Bennett Amendment, Section 703(h), which appears in the part of the statute dealing with defenses, is properly interpreted in accordance with its language and position in the statute as relating to defenses to a *prima facie* case of discrimination, not as defining discrimination. How that discrimination is to be proved is a matter not properly before the Court at this time, although we do point out that proof of such discrimination need not rest on proof of comparable worth of dissimilar jobs. All that this Court need decide here is that, under Title VII, there can be discrimination in compensation for women, even though men and women do not occupy jobs which would be deemed equal under the Equal Pay Act.

A. Allegations of Discrimination in Compensation Based on Sex Do Not Necessarily Require Proof of Comparable Worth of Male and Female Jobs

Petitioner argues this case on the assumption that, if men and women occupy positions which would not be

deemed equal for the purposes of the Equal Pay Act, a claim of discrimination could be proved only by a showing that the jobs of men and women are of comparable worth under a system of industrial job evaluation. On this basis, it devotes a large part of its brief to arguing a proposition which is not involved in the case at all, *i.e.*, that Congress made it clear, at the time it passed the Equal Pay Act, that it did not intend to require all American business to engage in a job evaluation program to determine the comparable worth of dissimilar jobs. Nothing in the position of plaintiffs, and nothing in the opinion of the court below or of the Third Circuit in *IUE* v. *Westinghouse, supra,* would require businesses to engage in job evaluations if they did not choose to do so, or to determine comparable worth of all men's and women's jobs. As the court below pointed out in its opinion on rehearing, this case is not about comparable worth; this case is about discrimination on the basis of sex.

There can be a showing of discrimination in compensation on the basis of sex (or, for that matter, on the basis of race or national origin) without a showing of comparable worth and without evaluations of the jobs involved. Intentional discrimination, for example, could be shown in various ways not involving comparable worth, such as statements by the employer reflecting a belief that women are worth less than men. If an employer were shown to have decided to pay $20,000 to fill a particular position but to have fixed the salary at $18,000 when a qualified black was chosen to fill the position, that would clearly be discrimination in compensation on the basis of race. It would equally be discrimination in compensation on the basis of sex if the decision to pay the lower salary were made because the position was to be filled by a woman. The fact that the job was the only one in the plant would not make the decision to pay the lower salary less discriminatory than if there were two jobs, one filled by a man at the higher salary and one by a woman at

the lower. *See Roesel* v. *Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979).

The use of a system for fixing the compensation of women different from the system used for compensating men, with the inevitable lowering of women's salaries as a result of that method, is discriminatory whether or not men and women occupy equal jobs. This Court so recognized when it held, in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), that it was a violation of Title VII to lower the compensation of women by requiring them to pay more into a pension fund than was required of men. At no time did the Court or any of the parties find it necessary to discuss the question whether the men and women involved were occupying similar or different positions. The significant fact was that the system did "not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.'" 435 U.S. at 711.

There are other examples of discrimination against women in compensation which result from the discriminatory nature of the system used to fix salaries. In *Evans* v. *Central Piedmont Community College*, 475 F. Supp. 114 (W.D.N.C. 1979), the court found discrimination against women as a class by the use of a system of "process management" which in theory provided that women could supervise the work product of other employees without supervising the employees themselves. The court found that this was in fact a method of paying women as clericals for doing work which was in reality supervisory. *See* 475 F. Supp. at 119. In *Christensen* v. *State of Iowa*, 563 F.2d 353 (8th Cir. 1977), where the Eighth Circuit held insufficient a showing that the employer disregarded its own evaluations of male jobs but paid men higher wages to meet the prevailing rate, the court noted that a *prima facie* case of discrimination would have been established if the defendant had paid the prevailing rate to men, but less than the prevailing

rate to women. 563 F.2d at 355 n.5.[2] In other words, the court recognized that the use of a system for fixing the salaries of women different from the system used for men could be discriminatory even if the jobs involved were totally dissimilar.

If an employer chooses to use an industrial evaluation to set salaries and then deliberately sets a lower scale for women than for men, that is clearly discrimination based on sex, whether or not the men's jobs and the women's jobs could be deemed equal for the purposes of the Equal Pay Act. That is what the plaintiffs alleged in *IUE* v. *Westinghouse*, *supra*, and what the Third Circuit properly held they should be allowed to prove if they can. Such a ruling does not, as plaintiffs suggest, require companies to engage in a comparable worth evaluation of dissimilar jobs. It merely requires them to refrain from using different standards for men and women and from deliberately depressing the salaries of certain jobs because they are occupied by women. The fact is that many companies, like Westinghouse, do, for their own purposes, rate jobs. *See, e.g.*, *Kyriazi* v. *Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978). If a company which uses such a system knowingly sets the scale for jobs primarily held by women lower than that used for men, there is no reason why such intentional discrimination on the basis of sex should be any less a violation of Title VII than would be similar disparate treatment based on race or national origin.

By and large, discrimination in compensation with relation to jobs which are not equivalent will involve proof of systemic discrimination, as the examples referred to above illustrate. Where a particular woman claims that she is underpaid because of her sex, it will usually be necessary to show that a male paid a higher salary is in an equivalent position. This is also true where discrimination

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[2] The court regarded it as unnecessary to interpret the Bennett Amendment unless a *prima facie* case of discrimination was shown. It thus treated the Amendment as a defense, not a definition of discrimination.

is alleged to be due to race. See the seminal case of *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 509-510 (E.D. Va. 1968), where, although finding systemic discrimination against blacks as a class, the court found wage discrimination as to particular blacks by comparing their salaries with whites employed in equivalent positions. For the reasons discussed below, we do not believe that the Bennett Amendment necessarily injects, even into an individual claim, the limitations of the Equal Pay Act. If an employer deliberately lowered the salary of a particular job because it was to be occupied by a woman, this would be discrimination based on sex. It would meet the simple test referred to *Manhart, supra*, of showing treatment of a woman in a manner which, except for her sex, would have been different. *See Roesel* v. *Joliet Wrought Washer Co., supra.*

It may also be possible to prove an individual claim in some other fashion. If male and female jobs, although dissimilar for purposes of the Equal Pay Act, are nevertheless very close and the disparity in pay is very great, it could be a reasonable inference that at least some of the difference in salary is due to sex, and not to the difference in jobs. The test, however, would still be discrimination based on sex, not merely difference in pay. The burden of proof would be on the plaintiff to prove the discrimination by whatever means are available. It may be that plaintiffs would choose to offer an expert job evaluation in an endeavor to prove that the pay difference is attributable only to sex, just as plaintiffs and courts rely on statistics to assess other claims of discrimination. *See Teamsters* v. *United States*, 431 U.S. 324 (1977). But this would not impose a job evaluation system on employers. Job analyses are regularly used, even in Equal Pay cases, in an endeavor to establish that jobs are equivalent under the standards of the Equal Pay Act. See *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Wetzel* v. *Liberty Mutual Ins. Co.*, 449 F. Supp. 397, 402 (W.D. Pa. 1978). The use of expert

evidence for such purpose does not run counter to the intent of Congress when it limited the Equal Pay Act to equal jobs. The Equal Pay Act forbids the payment of lower salaries to men and women for equal work regardless of intent. What Congress rejected, when it established the equal work requirement under that Act, was the notion that jobs had to be evaluated to determine whether totally dissimilar jobs were of comparable worth. The fact that job evaluations may be used to prove discrimination under Title VII does not undercut that position. The issue remains discrimination, either intentional or as a necessary result of the disparate method by which salaries are fixed for men and women.

Realistically, however, except for instances of overt, intentional discrimination based on sex, proof of discrimination in compensation based on sex with respect to dissimilar jobs will usually depend on proof of systemic disparate treatment of men and women in the method by which salaries are fixed. There is no reason to attribute to Congress an intention to permit such systemic discrimination against women which it would not permit against blacks.

Petitioner argues that it is not reasonable to attribute to Congress in 1965 an intent to impose on employers a standard of comparable worth which it rejected only a year before in the Equal Pay Act. Title VII does not, however, deal with comparable worth, but with discrimination. The Equal Pay Act, at the time it was passed, was recognized as being an act of limited scope, a "first step" toward the adjustment of balance of pay for women. 109 CONG. REC. 9193 (1963) (remarks of Rep. Bolton). Title VII, on the other hand, was part of a broad attack on discrimination generally as a factor in American life, focused originally on discrimination based on race and national origin. When, therefore, Congress added sex to the prohibited bases for discrimination, it knew that it was prohibiting discrimination against women in all the ways that it was prohibiting discrimination against minorities. The same kind of discrimination against women

as would constitute discrimination against minorities, whether in compensation or otherwise, is a violation of Title VII.

B. The Bennett Amendment Does Not Limit the Definition of Discrimination but Merely Incorporates the Defenses of the Equal Pay Act

1. *The language of the statute.* As discussed above, there can be discrimination in compensation based on sex even though women work at jobs which are not equal to those occupied by males. Such practices would clearly fall within the interdiction of Section 703(a) of Title VII, which makes it an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms or conditions of employment, or to segregate, limit or classify its employees in any way which would affect their status as employees. The language of Section 703(a) indicates as clearly as language can that Congress intended to "prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

The Bennett Amendment, Section 703(h) of Title VII, is the last part of an entire section dealing with defenses to a charge of discrimination. It would be a strange reading of a statute to hold that one part of a section relating to defenses limits the broad definition of discrimination defined in Section 703(a), particularly since Section 703(h) relates to only one of the protected classes specified in Section 703(a).

The language of the Bennett Amendment offers no support for this strange interpretation. It provides:

> It shall not be an unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the

> wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.[3]

The fact that the Equal Pay Act forbids pay differentials for equal work does not mean that it "authorizes" discrimination for unequal work, any more than the fact that it forbids pay differentials means that it "authorizes" discrimination in the classification or conditions of employment. The Equal Pay Act simply does not reach such discrimination; it does not authorize it. When Title VII broadly outlaws all forms of discrimination, except as authorized by the Equal Pay Act, it obviously refers to the differences which the Equal Pay Act does authorize: the four defenses to unequal payment for equal work.

The ordinary dictionary meaning of the term "authorize" is to establish or approve by authority.[4] Under the usual meaning of the term, a wage differential cannot be "authorized" by the Equal Pay Act unless it is specifically approved by the Equal Pay Act, *i.e.*, unless it comes within one of the four affirmative defenses recognized by the Equal Pay Act.

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[3] Section 206(d) of Title 29, the Equal Pay Act, provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production or (iv) a differential based on any other factor other than sex.

[4] WEBSTER'S SECOND INTERNATIONAL DICTIONARY 186 (1952); RANDOM HOUSE DICTIONARY 100 (1967).

This is the sense in which Congress has repeatedly used the term "authorized". 28 U.S.C. § 1343 provides that the district courts shall have original jurisdiction of "any civil action authorized by law"; plainly, some specific law must provide the basis of a cause of action before the test of § 1343 will be satisfied. *Howell* v. *Cataldi*, 464 F.2d 272, 274-82 (3d Cir. 1972). 18 U.S.C. § 1905 prohibits the disclosure by Federal officials of certain information "to any extent not authorized by law"; plainly, this contemplates that some specific law must approve disclosures of such information if they are to be lawful. *Westinghouse Elec. Corp.* v. *Nuclear Regulatory Comm'n*, 555 F.2d 82, 94 (3d Cir. 1977). To extend the term "authorized" to include any claim or conduct not prohibited by another statute would radically alter the established meaning of these provisions. 28 U.S.C. § 1343 would then allow all civil actions not expressly prohibited by Congress, and 18 U.S.C. § 1905 would then allow all disclosures of information which were not expressly prohibited. Clearly, such a construction would be impermissible.[5]

2. *The legislative history.* As discussed above, discrimination against women in compensation in relation to jobs which are not similar will, in most instances, involve some form of systemic discrimination. It is well to keep this fact in mind in considering the legislative history of the Bennett Amendment because, at the time of the enactment of the Civil Rights Act of 1964, Congress, while endeavoring to eradicate discrimination in employment as a factor in American life, was not really aware of the degree to which discrimination was embodied in systemic, institutionalized form. As the House

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[5] *Cf. Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976):

> . . . the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

Committee Report on the proposed 1972 amendments stated (H.R. REP. No. 92-238, 92d Cong., 1st Sess. 8 (1971)):

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization.
>
> * * *
>
> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than intentional wrongs.
>
> * * *
>
> It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

Therefore (as we discuss below), while the statements made by various Congressmen in 1965 do not, in and of themselves, support the view of the Bennett Amendment suggested by the petitioner, those statements have even less significance in relation to claims of systemic discrimination against women with respect to compensation. At most they mean only that, where women claim unequal pay for equal work, the standards of the Equal Pay Act apply.

The legislative history is fully covered in part D of the majority opinion of the Third Circuit in *IUE* v. *Westinghouse*, *supra*, 631 F.2d at 1101-05, and extensive discussion here seems unnecessary. The remarks on which petitioners rely are so equivocal that they do not serve to overcome the normal reading of Section 703 (h) as relating to defenses, rather than as qualifying the definition of discrimination in Section 703(a). Sena-

tor Bennett offered his amendment as a "technical objection" to avoid "possible conflict between Title VII and the Equal Pay Act." 110 CONG. REP. 13647 (1964). It is difficult to believe that a drastic limitation on the definition of discrimination, which would have the effect of allowing discrimination against women which would not be allowed against minorities, would have been characterized as a technical objection. It is much more reasonable to accept, as the court below and the Third Circuit did, the remarks of Senator Dirksen that:

> We were aware of the conflict that might develop because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried in the basic act.[6]

Petitioner relies on the remarks of Representative Celler in the House explaining the effect of the Bennett Amendment. He said (110 CONG. REC. 15896 (1964)) that the amendment

> provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(b) [*sic*].

The statement cannot be taken as accurate since compliance with the Equal Pay Act would not satisfy the requirements of Title VII with respect to all claims of sex discrimination, including non-monetary claims. It probably reflects the general thinking of the time that discrimination was based on individual acts. In any

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[6] The pre-Bennett Amendment question and answer of April 8, 1964 discussed in the *IUE* opinion shows that Congress understood that Title VII was broader than the Equal Pay Act. The answer stating that the standards in the Equal Pay Act for determining discrimination as to wages were applicable "to the comparable situation under Title VII," 110 CONG. REC. 7217 (1964), relates to situations covered by both acts, i.e., claims of unequal pay for equal work.

event, it is certainly not the kind of clear expression of legislative intent which would serve to overcome the plain meaning of the language used and its position in the statute.

Interpreting the Bennett Amendment as incorporating into Title VII the defenses of the Equal Pay Act does not render the amendment superfluous. Although Section 703 contained exceptions similar to three of the four exceptions of the Equal Pay Act, no one could have been sure, at the time of the enactment of Title VII, that the similar provisions in the two acts would be construed in the same manner. There is some difference in the wording of two of the exceptions, since Section 703 refers to "bona fide" seniority and merit systems while the Equal Pay Act refers simply to seniority and merit systems. Moreover, one of the defenses available under the Equal Pay Act, permitting a differential "based on any other factor other than sex" is not otherwise included in Section 703. Just seven weeks prior to passage of the Bennett Amendment, the Wage-Hour Administrator had issued an extensive elaboration of Equal Pay standards and defenses, including a statement of factors which would establish this defense. 29 Fed. Reg. 5548 (April 24, 1964). As shown by the legislative history of the Equal Pay Act discussed in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), Congress, when it passed the Equal Pay Act, was aware that some companies were using job evaluation systems which might fairly account for differences in pay for jobs that on the surface appeared to require equal skills. If such evaluations were truly based on a factor other than sex, such differences in pay would be authorized under the Equal Pay Act. For example, the court in *Hodgson* v. *Robert Hall Clothes*, 473 F.2d 589, 593-596 (3rd Cir.), *cert. denied*, 414 U.S. 866 (1973), concluded that economic benefit to the employer was a factor other than sex justifying differences in pay. It is to that kind of defense that the Bennett Amendment relates. Since the prohibi-

tion on discrimination based on sex came late in the development of Title VII, Senator Bennett, as he explained, proposed to avoid a "possible conflict". There was no claim that the drafter of the Amendment, which was offered after cloture had been imposed, had explored in any depth the areas of possible conflict. Hence the existence of some overlap in the various parts of Section 703(h), all relating to defenses, does not militate against the interpretation of the Bennett Amendment as relating to defenses.

3. *The administrative interpretation.* The early EEOC guidelines, and the statements of its general counsel on which petitioner relies (Pet. Br. 89-94), do not undermine the natural reading of the Bennett Amendment as dealing with defenses to a *prima facie* showing of discrimination, rather than as limiting the definition of discrimination in Section 703(a). The 1965 Guidelines on Discrimination Because of Sex (Pet. Br. 80-81) did recognize the need "to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable." Certainly, therefore, the Pay Act standards as to what constitutes equal pay for equal work were then and are now properly held applicable to determining that issue in a Title VII context. The question of what constitutes equal work is, in many situations, subject to different interpretations, as various decisions show. *See, e.g., Corning Glass Works* v. *Brennan, supra*; *Hodgson* v. *Robert Hall Clothes, supra.* These decisions are properly deemed incorporated into Title VII where claims of unequal pay for equal work are asserted. That is what we believe this Court meant by its reference to the Equal Pay Act in *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 144 (1976).

This is, however, a far cry from saying that, because the equal work standard developed under the Equal Pay Act should be used in determining such claims in Title VII cases, no other form of discrimination can be shown. Nothing in any of the guidelines or opinions under Title

VII on which petitioner relies can fairly be read as a determination that a system of disparate treatment of men and women with respect to compensation, or intentional discrimination on the basis of sex, was not within the coverage of Section 703(a) of Title VII. The Commission recognized from the start that the statutory ban on discrimination in compensation because of sex was coextensive with that of the other prohibitions in Section 703(a), and that Title VII was not limited to those employees covered by the Fair Labor Standards Act. If the Bennett Amendment were held to have permitted any discrimination not expressly forbidden by the Equal Pay Act, then, logically, it should also be said to have authorized unequal payment for equal work in establishments excepted from the Equal Pay Act. The statute has not been and cannot fairly be so read. The fact is that, when the Commission began to be confronted with systemic discrimination, such as situations where different systems were used for the fixing of the salaries of men and women, it did take the position that proof of such allegations would establish violations of Title VII. This was true under the 1965 guidelines, before they were amended in 1972. Case No. 66-5762 (decided June 20, 1968), 1973 CCH EEOC Decisions ¶ 6001 n.22; Decision No. 70-112 (Sept. 5, 1969), 1973 CCH EEOC Decisions ¶ 6108; Decision No. 71-2629 (June 25, 1971), 1973 CCH EEOC Decisions ¶ 6300.

4. *Judicial decisions.* The only two cases which have examined in depth whether the Bennett Amendment limits the definition of discrimination, so as to permit employers intentionally to set lower compensation rates for women because of their sex, are the decision below and the decision of the Third Circuit in *IUE* v. *Westinghouse, supra.* In *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), the court indicated its view that "a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enu-

merated exceptions to the Equal Pay Act", but the court found it unnecessary to decide the Title VII compensation claim since it found a violation of the Equal Pay Act.

The cases on which petitioner relies holding, in the words of *Ammons* v. *Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971), that "to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work" are not really contrary to the position of the court below and the Third Circuit. The courts in all the cases relied on were dealing with the sufficiency of proof, not with the more general question of whether there ever can be any actionable discrimination in compensation (including intentional lowering of salary because of sex) without a showing that men and women occupy equal jobs. As noted above, in many cases—particularly those involving individual, as distinct from systemic, claims—an allegation of discrimination in compensation will require a showing that there has been unequal pay for equal work under the standards of the Equal Pay Act. That was the claim in *Ammons* which the court found not proved. There was no attempt in *Ammons*, or in most of the other cases relied upon by petitioner, to prove intentional sex discrimination, or different methods used in the fixing of men's and women's salaries, or even that the dissimilarity in pay with respect to similar albeit unequal jobs was so gross as to be attributable, at least in part, only to the fact that the jobs were filled by women. In *Stastny* v. *Southern Bell Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), the court (after ruling that the case had been improperly treated as a class action) found that the complainants, although improperly denied promotion, had not shown that their individual salaries were unequal to those of men in similar positions. Since the court found that state-wide statistical evidence was not properly applicable to the particular plant at issue (628 F.2d at 279), it had no occasion to consider whether claims that

women as a class were discriminated against in salaries could be proved by comparison of average female earnings with average male earnings within broad salary classifications. *Cf. Arkansas Educ. Ass'n* v. *Board of Educ.*, 446 F.2d 763 (8th Cir. 1971), where the court found relevant to a claim of salary discrimination based on race the fact that no black school teacher had been awarded a salary as high as a white school teacher. In *Lemons* v. *City of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3250 (Oct. 6, 1980), the Tenth Circuit held that plaintiffs had not proved sex discrimination by an attempted showing of comparable worth of totally dissimilar jobs, where the district court specifically found that men and women were treated in the same fashion. This is certainly not a holding that, where men and women are treated differently, there cannot be discrimination merely because they work at different jobs. As discussed above, the implications of this Court's decision in *City of Los Angeles* v. *Manhart* are clearly to the contrary.

In sum, nothing in the legislative history or administrative or judicial interpretations of the Bennett Amendment lends support to the position of petitioner that proof that men and women perform equal work is a necessary ingredient of any claim of sex discrimination in compensation under Title VII. All that this Court is called upon to decide in this case is that to state a cause of action under Title VII, a claimant need not allege that men and women occupy equal jobs. Whether, and how, where the jobs are unequal, the claimants can prove their claim of sex discrimination, are issues not presently before this Court. It is enough to recognize that proof of such allegations need not inevitably, as petitioner claims, rest on proof of comparable worth; that there are other means of showing intentional or systemic treatment of men and women with respect to compensation. Such disparate treatment of women is discrimination, as would

be equivalent disparate treatment of racial and ethnic minorities. Allegations of such discrimination therefore state a claim under Title VII.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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January 28, 1981

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